

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
ABC, INC.)	File Nos. EB-02-IH-0554
)	NAL/Acct. No. 200432080009
Licensee of Station WDRQ(FM))	FRN 0003-4534-95
Detroit, Michigan)	Facility ID # 70040
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 5, 2003**Released: December 8, 2003**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture, we find ABC, Inc. ("ABC"), licensee of Station WDRQ(FM), Detroit, Michigan, apparently liable for a monetary forfeiture in the amount of Four Thousand Dollars (\$4,000.00) for a violation of section 73.1216 of the Commission's rules,¹ which requires licensees to broadcast fully and accurately the material terms of a contest. We find that ABC broadcast a contest, "War of the Sexes," without disclosing a material term of the contest, *i.e.*, that the movie prize passes that it awarded to its contest winners did not guarantee theater admission.

II. BACKGROUND

2. On June 5, 2002 the Commission received a complaint filed by Mr. Joe Luckier. According to the complaint, on April 29, 2002, Mr. Luckier participated in a contest called "War of the Sexes," which was broadcast over Station WDRQ(FM). During the contest, one male and one female caller were selected to answer trivia questions. Mr. Luckier won the contest and was awarded two movie prize passes to the premiere showing of the film "Spiderman," valid only for the evening of May 1, 2002. Mr. Luckier was unable to redeem the movie prize passes on that day, however, due to large crowds at the theater that evening.

3. On June 25, 2002, the Investigations and Hearings Division of the Enforcement Bureau sent a letter of inquiry to ABC.² Because ABC failed to respond, the Division sent another letter of inquiry to ABC on August 9, 2002,³ to which ABC responded on August 30, 2002.⁴ The Investigations and

¹ 47 C.F.R. § 73.1216.

² See Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to ABC, Inc., dated June 25, 2002.

³ See Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to ABC, Inc., dated August 9, 2002.

Hearings Division sent a subsequent letter of inquiry to ABC requesting additional information on October 22, 2002.⁵ ABC responded by letter dated November 21, 2002.⁶

4. ABC does not dispute that Mr. Lucker won the movie passes or that he was unable to see “Spiderman” on the evening of May 1, 2002.⁷ It argues, however, that WDRQ(FM) personnel informed Mr. Lucker by telephone when it awarded him the prize and when it later provided him the passes that admission to the movie was not guaranteed. ABC also contends that the passes themselves contain a legend indicating that the admission was not guaranteed.⁸ ABC further submits that, even though Mr. Lucker did not get in to see “Spiderman” that evening, it offered him tickets to another movie playing that night, gave him several WDRQ(FM) promotional items, and purchased tickets for him to see “Spiderman” at a later date.⁹

5. ABC acknowledges that WDRQ(FM) did not broadcast announcements in connection with the “War of the Sexes” promotion indicating that prizes of equal value may be substituted or that the passes awarded did not guarantee admission to the movie.¹⁰ ABC notes that, subsequent to the incident involving Mr. Lucker, listeners were told on the air about the limitations of movie premiere passes, including the fact that seating capacity was limited and that a pass did not guarantee admission. ABC further relates that the station now airs generic contest rules that note that the station reserves the right to substitute a prize for equal or greater value in the event that the announcement prize is unavailable.¹¹

6. ABC submits that WDRQ(FM) took several corrective actions to ensure that Mr. Lucker was treated fairly, including offering him tickets to another movie that night and other promotional items.¹²

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⁴ See Letter from David Cohen, Executive Counsel, Law & Regulation, ABC, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, dated August 30, 2002 (hereinafter “August 30 Response”).

⁵ See Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau. Federal Communication Commission to ABC, Inc., dated October 22, 2002 (hereinafter “October 22, 2002”).

⁶ See Letter of Inquiry from David Cohen, Executive Counsel, Law & Regulation, ABC, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated November 21, 2002 (hereinafter “November 21 Response”).

⁷ *Id.* at 5.

⁸ The legend reads: “Theatre is not responsible for overbooking. Seating is on a first-come, first-served basis. No one will be admitted once the film begins or without a pass. THIS PASS ADMITS ONE.” (emphasis in original). August 30 Response, Attachment.

⁹ November 21 Response at 5.

¹⁰ November 21 Response at 2. Indeed, the contest announcement specifies that “[p]rizes are non-transferable and with no substitutes.” The Station’s written contest rules similarly so provide. *Id.*

¹¹ November 21 Response at 5.

¹² *Id.*

III. DISCUSSION

7. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.¹³ In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹⁴ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.¹⁵ As we set forth in greater detail below, we conclude under this standard that ABC is apparently liable for a forfeiture for its apparent willful and repeated violations of section 73.1216 of the Commission's rules.

8. Section 73.1216 of the Commission's rules provides:

A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description shall be false, misleading or deceptive with respect to any material term.

Note 1 to that rule provides that the material terms of the contest include "the extent, nature and value of prizes" and "the basis for valuation of the prizes." Note 2 to the rule states:

In general, the time and manner of disclosure of the material terms of a contest are within the licensee's discretion. However, the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate and continues thereafter. The material terms should be disclosed periodically by announcements broadcast on the station conducting the contest, but need not be enumerated each time an announcement is sufficient. In addition to the required broadcast announcements, disclosure of material terms may be made in a non-broadcast manner.

¹³ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

¹⁴ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹⁵ *See, e.g., SBC Communications, Inc.*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

9. In this case, it appears that ABC violated section 73.1216 of the Commission's rules by not disclosing during any of its broadcast announcements a material term of the "War of the Sexes" contest, *i.e.*, the fact that the movie prize passes did not guarantee admission to the theater. Although the contestants were apparently informed after the prizes were awarded that the movie passes did not guarantee admission, ABC's failure to broadcast fully and accurately the nature and value of the prize is a clear violation of the rule.¹⁶ Licensees, as public trustees, have the affirmative obligation to prevent the broadcast of false, misleading or deceptive contest announcements.¹⁷ A broadcast announcement concerning a contest is false, misleading or deceptive "if the net impression of the announcement has a tendency to mislead the public."¹⁸ Accordingly, the Commission has repeatedly held that "licensees are 'responsible for broadcasting accurate statements as to the nature and value of contest prizes, and will be held accountable for any announcement which tends to mislead the public.'"¹⁹ WDRQ(FM) admittedly failed to broadcast the nature and value of its contest prize – the fact that the movie prize pass did not guarantee admission to the film. Although WDRQ(FM) later took remedial actions, these actions do not absolve ABC from liability and the proposed forfeiture penalty.²⁰

10. Based upon the evidence before us, we find that ABC apparently willfully²¹ violated section 73.1216 of the Commission's rules. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$4,000.00 for failure to broadcast fully and accurately the material terms of a contest.²² In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act,²³ which include the nature, circumstances, extent, and gravity of the

¹⁶ Although non-broadcast disclosures (such as making contest rules available at the stations and on the World Wide Web) can supplement broadcast announcements, they cannot act as a substitute for broadcast announcements. *AK Media Group, Inc.*, 15 FCC Rcd 7541, 7543 (Enf. Bur. 2000); *Clear Channel Broadcasting Licenses, Inc.*, 15 FCC Rcd 2734, 2735 (Enf. Bur. 2000).

¹⁷ *WMJX, Inc.*, 48 RR 2d 1339, 1355 (1981).

¹⁸ *Id.* at 1355-56. "The Commission stated in *Eastern Broadcasting Corp.*, 14 FCC 2d 228, 229 (1968): 'Deception may result from the use of statements which are not technically false or which may be literally true, since only the relevant consideration is the impact of the statements to the public.'" *WMJX, Inc.*, 48 RR 2d at 1355-56 & n.82. Moreover, licensees will be held accountable for broadcasting ambiguous contest rules that tend to mislead the public. *Id.* at 1357 & n. 81.

¹⁹ *Citicasters Co.*, 15 FCC Rcd 16612, 16613-14 (Enf. Bur. 2000) (quoting *WMJX, Inc.*, 48 RR 2d at 1357); *Clear Channel Broadcasting Licenses, Inc.*, 15 FCC Rcd 2734, 2735 (Enf. Bur. 2000) (same).

²⁰ See *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); see also *Station KVGL, Inc.*, 42 FCC 2d 258, 259 (1973).

²¹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act" See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

²² *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

²³ 47 U.S.C. § 503(b)(2)(D).

violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require. After considering the record, the factors contained in section 503(b)(2)(D) of the Act, 47 U.S.C. §503(b)(2)(D), and the Forfeiture Policy Statement, we believe that a \$4,000 forfeiture is appropriate in this case.

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended,²⁴ and sections 0.111, 0.311, and 1.80 of the Commission's rules,²⁵ that ABC, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Four Thousand Dollars (\$4,000.00) for willfully violating section 73.1216 of the Commission's rules.

12. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of this Notice, ABC, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above and also should note the NAL/Acct. No. referenced above.

14. The response, if any, must be mailed to Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B433, Washington, D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁶

17. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division. Your certification

²⁴ 47 U.S.C. § 503(b).

²⁵ 47 C.F.R. §§ 0.111, 0.311 and 1.80.

²⁶ See 47 C.F.R. § 1.1914.

should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities (OCBO) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

18. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to David Cohen, Esquire, at ABC, Inc., Law & Regulation Department, 77 West 66th Street; New York, NY 10023.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

October 2002

ATTACHMENT A

FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
(2) Small Governmental Jurisdiction	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
(3) Small Business	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
Industry Type	Description of Small Business Size Standards
<i>Cable Services or Systems</i>	
Cable Systems	Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<i>Common Carrier Services and Related Entities</i>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

International Services	
International Broadcast Stations	\$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
Mass Media Services	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – Small Business is less than \$40M in annual gross revenues for three preceding years
Wireless and Commercial Mobile Services	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHZ Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - Small Business is \$40M or less in annual gross revenues for three previous calendar years Very Small Business is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard -

900 MHz Specialized Mobile Radio	Small Business is \$15M or less average annual gross revenues for three preceding calendar years
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	Small Business is 1,500 employees or less Small Government Entities has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – Small Business is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – Small Business has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	\$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
218-219 MHz Service	First Auction special size standard (1994) – Small Business is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their

	affiliates)
<i>Miscellaneous</i>	
On-Line Information Services	\$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)